

No. 14625

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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BILTMORE MUSIC CORPORATION and HERBERT BROWNELL,  
JR., Attorney General of the United States, as Suc-  
cessor to the Alien Property Custodian,

*Appellants,*

*vs.*

ROBERT W. KITTINGER,

*Appellee.*

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## BRIEF FOR APPELLEE.

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## BRIEF FOR APPELLEE.

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### Jurisdictional Statement.

This appeal by plaintiffs-appellants is from a final judgment of the United States District Court for the Southern District of California, Central Division, dismissing on the merits plaintiffs-appellants complaint for infringement of two United States statutory copyrights. The cause of action in the complaint arose under the Copyright Law of the United States (17 United States Code, Secs. 1 to 215 incl.) and the Trading with the Enemy Act (50 United States Code, Appx. Sec. 17) and jurisdiction is based upon Section 1331 of Title 28 of the United States Code as Amended. Judgment of said District Court being final, this Court has jurisdiction under 28 United States Code, Section 1291.

## Statement of the Case.

The case was tried on an agreed statement of facts [Tr. pp. 39-49]. The facts stipulated to by the parties are summarized as follows:

Prior to January 1, 1935, Gerhard Ebeler and Hans Otten, two German Nationals composed a musical composition entitled "Du Kannst Nicht Treu Sein" (You Can't Be True), referred to as the "composition" in the agreed statement of facts, and as the "basic work" in appellants' brief. During the year 1935 Ebeler and Otten assigned all rights to the composition to one Verlag, another German National, who made application for and was granted a United States copyright under Registration E For. No. 39841.

Between 1935 and 1938, Verlag, the then copyright owner, licensed a German firm to record said composition and make phonograph records of same, which was done. During 1938 phonograph records of the composition were sold in the United States. On February 24, 1948, all rights, privileges and powers in connection with Copyright E For. No. 39841 were seized by the Alien Property Custodian and title thereto subsequently transferred to the Attorney General of the United States.

During the period between January 1, 1947 and January 1, 1949, appellee acted as President and General Manager of Chicago Recording Studios, Inc., an Illinois corporation, hereinafter referred as "Chicago" which was engaged in the manufacture and sale of phonograph records.

Shortly prior to August 20, 1947, Ken Griffin, a musician, offered to record some new arrangements he had devised for Chicago. Chicago accepted Griffin's offer,

and on or about August 20, 1947, Griffin recorded eight master records for Chicago, for which he was paid the current union scale. A master record is a recording that is used as the basis for making phonograph records of the material recorded thereon. One of the masters was an organ solo of a new arrangement of the composition "Du Kannst Nicht Treu Sein."

On October 1947, Chicago issued phonograph records of the new arrangement under the title, "You Can't Be True." Subsequently Chicago manufactured 207,000 of these records, all of which were replicas of the Ken Griffin recording.

One J. F. Bard, after hearing the Chicago phonograph record, "You Can't Be True," collaborated with one Dave Dreyer who had not heard the record, in composing English lyrics for the new arrangement. On February 17, 1948, J. F. Bard obtained a written instrument executed by Ken Griffin that is alleged to be an assignment of the music of the new arrangement to Bard.

On March 2, 1948, J. F. Bard Company, Inc. was granted a license, E 1277, by the Office of Alien Property to publish sheet music and issue phonograph records of the composition in the form of a new arrangement and with the new lyrics.

On March 8, 1948, appellant Biltmore Music Corporation was incorporated under the laws of the State of New York. On March 12, 1948 Dave Dreyer was elected President and J. F. Bard was elected Vice President of said corporation.

On March 15, 1948 appellant Biltmore Music Corporation deposited two copies of sheet music in the Copyright Office, which sheet music contained the music of the new

arrangement as Ken Griffin had recorded it for Chicago, together with said English lyrics composed by Dave Dreyer and J. F. Bard.

On April 9, 1948 appellant Biltmore Music Corporation was granted copyright registration E Pub. No. 24797 on the new arrangement and English lyrics. Appellant Biltmore Music Corporation on March 9, 1948 filed a Notice of Use in the United States Copyright Office.

Appellant Biltmore Music Corporation on March 16, 1948 wired appellee to stop pressing records of "You Can't Be True" as records infringed copyright controlled by Biltmore.

Chicago Recording Studios, Inc., after this notice attempted to obtain license from the Office of Alien Property under Copyright E For. No. 39841 but was refused.

Between March 18, 1948 and November 9, 1948, appellant Biltmore licensed eighteen phonograph record companies under Copyright E Pub. No. 24797.

At no time was a Notice of Use under 17 U. S. C. Section 1(3) filed in the Copyright Office by Ken Griffin on his new arrangement.

At no time was a Notice of Use under 17 U. S. C. Section 1(e) filed in the Copyright Office by the Office of Alien Property, Attorney General of the United States, or any other owner of the copyright on the composition, "Du Kannst Nicht Treu Sein."



## The Questions Involved.

1. Did failure of the foreign owners of the United States copyright on the composition, as well as the Office of Alien Property, to file notice of the intention to mechanically reproduce the composition, preclude appellants from recovering the statutory royalty as provided for in 17 U. S. C. Section 1(e) from appellee for records of said composition sold my him?

2. Can appellants recover statutory royalties from appellee for sale of records of the new arrangement when Chicago Recording Studios, Inc. had:

- (a) Paid Ken Griffin a valuable consideration to record a master of the new arrangement, which master was used as a basis for the reproduction of the alleged infringing records?
- (b) The alleged infringing record sold by appellee had been manufactured by Chicago Recording Studios, Inc. and played extensively in public for at least six months before appellant Biltmore Music Corporation secured copyright E Pub. No. 24797 thereon.

## Summary of Argument.

I. Failure of owners of United States copyright on the composition "Du Kannst Nicht Treu Sein" to comply with the provisions of 17 U. S. C. Section 1(e) prevents appellants from collecting the statutory royalties from appellee or other persons who may mechanically reproduce said composition.

II. Ken Griffin, due to failure on the part of the owners of the United States copyright on the composition to comply with provisions of 17 U. S. C. Section 1(e), did not require their permission to devise and record the new arrangement.

III. Ken Griffin was the composer of the new arrangement and had a property right therein under which he could grant licenses and which property right he could assign.

IV. The copyright on the new arrangement obtained by appellant Biltmore was invalid, inasmuch as it had been published by widespread public playing thereof prior to the Biltmore Music Corporation application for copyright protection on the Dreyer-Bard arrangement.

V. No appealable error has been brought before the Court by appellants.

VI. The judgment should be affirmed.

## The Controlling Statutory Law Here Involved.

The Copyright Law (Title 17, United States Code) upon which this action is brought, was passed in 1909 and it repealed and superseded all prior copyright laws. This case must be decided in accordance with the specific provisions of the Copyright Act, 17 U. S. C., Sections 1-215, which clearly states:

“1. EXCLUSIVE RIGHTS AS TO COPYRIGHTED WORKS.—Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

“(a) To print, reprint, publish, copy, and vend the copyrighted work;

“(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for art;

\* \* \* \* \*

“(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: *Provided*, That the provisions of this title, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after July 1, 1909, and shall

not include the works of a foreign author or compose unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights. \* \* \* It shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

“In case of failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand, the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this title, not exceeding three times such amount.

“2. RIGHTS OF AUTHOR OR PROPRIETOR OF UNPUBLISHED WORK.—Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.

\* \* \* \* \*

“9. AUTHORS OR PROPRIETORS, ENTITLED; ALIENS.—The author or proprietor of any work made the subject of copyright by this title, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms

specified in this title: *Provided, however,* That the copyright secured by this title shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation only:

“(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or

“(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection, substantially equal to the protection secured to such foreign author under this title or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.

\* \* \* \* \*

“11. REGISTRATION OF CLAIM AND ISSUANCE OF CERTIFICATE.—Such person may obtain registration of his claim to copyright by complying with the provisions of this title, including the deposit of copies, and upon such compliance the Register of Copyrights shall issue to him the certificates provided for in section 209 of this title.

“12. WORKS NOT REPRODUCED FOR SALE.—Copyright may also be had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or dramatico-musical composition; of a title and description, with one print taken from each scene or act, if the work be a motion-picture photoplay;”

### POINT ONE (1).

**Failure of Owners of the United States Copyright on the Composition, "Du Kannst Nicht Treu Sein" to Comply With the Provisions of 17 U.S.C. Section 1(e) Prevents Appellants From Collecting Statutory Royalties From Appellee or Others Who May Have Mechanically Reproduced Said Composition.**

Appellants have argued at length in Point One, pages 10-18 of their opening brief that neither the Attorney General nor his predecessors in title to the United States copyright on the composition were required to comply with provisions of 17 U. S. C., Section 1(e) as a condition precedent to collecting the statutory royalties for mechanical reproduction of the composition.

In support of their position, appellants have cited numerous United States and foreign cases, various foreign proclamations, as well as excerpts from leading text books. Unfortunately, this cited material is completely irrelevant to the question at hand, but is instead directed to and concerned with the extraterritorial effect of a copyright.

In their desire to establish that neither the Attorney General nor his predecessors in title are obligated to comply with 17 U. S. C., Section 1(e) as a condition precedent to collecting statutory royalties, appellants have overlooked the following basic facts.

The most basic fact is that the provisions of the Copyright Act of 1909 are statutory. Therefore, in order to obtain the benefits of the Act, the provisions of the Act must be strictly complied with.



In *Calega v. Inter-Ocean Newspaper Company* (1909), 215 U. S. 188, the Supreme Court stated,

“Statutory copyright is not to be confounded with the common law right, as at common law the exclusive right to copy existed in the author until he permitted a general publication. Thus, when a book was published in print, the owner’s common law right was lost. At common law an author had a property in his manuscript, and might have an action against any one who undertook to publish it without authority. The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period. *This statutory right is obtained in a certain way and by the performance of certain acts which the statute points out.*”

The rights of a copyright owner of a musical composition under the Copyright Act are clearly summarized in *Shilkret v. Musicraft Records, Inc.* (C.C.A. 2), 55 U. S. P. Q. 471, wherein it was held,

“By complying with section 11 an author gets the statutory rights specified in section (1) and among them, in the case of a musical composition, the right of mechanical recording and reproduction under clause (e). It is an established rule of statutory construction that a proviso states an exception from the general policy which a law embodies, and should be strictly construed and so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment *Spokane & Inland R. R. v. United States*, 19 Wall. 227, 336.”

The rights granted under 17 U. S. C., Section 1(e) relative to mechanically reproducing musical compositions registered under the Act are given to all composers who

are United States citizens, but are granted to only those foreign composers who are citizens of countries which by treaty, convention, agreement or law grant similar rights to United States citizens.

Under the provisions of 17 U. S. C., Section 1(e) certain foreign composers can qualify to obtain the same rights as a United States citizen and composer. However, at the most, the foreign composer obtains rights equal to those granted a United States composer.

A United States citizen who is the owner of a United States copyright on a musical composition has a duty, if he wishes to avail himself of the provisions of the Copyright Act relative to collecting statutory royalties for mechanical reproduction of the composition, which duty is that he must file a notice of use in the Copyright Office if he mechanically reproduces the composition or licenses others so to do. Section 1(e) provides that failure to file such notice shall be a complete defense to any suit, action or proceeding for any infringement of such copyright.

In framing the provisions of the Copyright Act Congress wisely did not geographically limit the country in which the first mechanical reproduction could take place. Had the Act been so limited, the provisions thereof as to statutory royalties derived from United States copyrights could have been easily circumvented by either American citizens or foreign citizens by licensing the mechanical reproduction of copyrighted compositions in foreign countries, and then having phonograph records of the recorded compositions shipped to the United States for sale therein.

At the time Verlag filed for and obtained his United States copyright on the composition he was entitled so to



do, for at that time Germany granted similar rights to United States citizens. Verlag then had the same rights under the Copyright Act relative to the composition as though he were a United States citizen. However, Verlag had the same duty under the Copyright Act as a United States citizen if he wished to collect statutory royalties for mechanical reproduction of the composition in the United States. The duty Verlag was obligated to perform was the same as that required of a United States citizen, which was to file a notice of use when he first mechanically reproduced or licensed others to mechanically reproduce his composition.

Verlag failed to perform this duty, and accordingly all rights under the Copyright Act to recover statutory royalties on mechanical reproduction of the composition within the territorial limits of the United States were lost. When the copyright on the composition was acquired by the Office of Alien Property it was subject to the defect that statutory royalties could not be recovered for the mechanical reproduction thereof within the territorial limits of the United States. The question as to whether statutory royalties can be recovered for the mechanical reproduction of the composition in the United States is in no way dependent upon whether the United States Copyright Act has any extra-territorial effect, but is dependent on the simple fact that Verlag, as a German citizen, was bound by the same duties as a United States citizen. The geographical location of his residence or where he licensed the mechanical reproduction of the composition is of no consequence.

It will be apparent that even if it could be held that the breach of duty on the part of Verlag did not result in forfeiture of the right to collect statutory royalties on

the composition, that the duty as defined in 17 U. S. C., Section 1(e) was breached a second time when the Office of Alien Property granted the license to J. F. Bard Company without filing a notice of use in the Copyright Office. This second breach of said duty would be sufficient to prevent appellants' recovery of statutory royalties from appellee.

## **POINT TWO (2).**

**Due to Failure on the Part of the Owners of the United States Copyright on the Composition to Comply With Provisions of 17 U. S. C., Section 1(e) Ken Griffin Was Relieved of the Necessity of Obtaining Their Permission to Devise and Record the New Arrangement.**

As composer of the new arrangement, Ken Griffin had a property right therein, at least with regard to preventing others from performing the new arrangement without his permission. Normally Ken Griffin's recording of his new arrangement would have been an infringement of the copyright on the composition, but for reasons detailed hereinabove, the owners of the copyright on the composition had forfeited their right to collect royalties for the mechanical reproduction thereof.

Therefore, Ken Griffin as the owner of a property right in the new arrangement, could mechanically reproduce the new arrangement without infringing the copyright on the composition. The property right so secured by Ken Griffin did not arise under the Copyright Act, but is that inherent right possessed by all composers of being able to prevent the unauthorized performance of musical compositions composed by them.

### POINT THREE (3).

**Ken Griffin Was the Composer of the Arrangement and Had a Property Right Therein Under Which He Could Grant Licenses, Which Property Right He Could Assign.**

As owner of a property right in the new arrangement, Ken Griffin not only could mechanically reproduce the new arrangement himself, but could license others so to do. For a valuable consideration Ken Griffin chose to record the new arrangement as a master for Chicago [Tr. pp. 41-42, Par. 9]. Subsequently, Chicago used said master for the only purpose to which it could be put [Tr. pp. 42-43, Par. 10], that of making phonograph records of the new arrangement.

By so recording the new arrangement for a valuable consideration, Ken Griffin granted Chicago a license to manufacture and sell phonograph records of the new arrangement. This license so granted to Chicago is a complete defense to the present action for infringement, as the assignment of the new arrangement by Griffin to J. F. Bard on February 17, 1948 was subject to the previously granted Chicago license. In *Piantadosi v. Loews' Incorporated, et al.* (C. C. A. 9), 59 U. S. P. Q. 176, Decided June 2, 1943, the court stated:

“The assignment to Feist, Inc., being proved, the publisher became at least a co-owner of the copyright, Section 42 of the Copyright Act. The question, then, is whether a third party licensed to use a copyrighted work by one co-owner incurs liability for infringing the copyright to other co-owners who gave no consent. A negative answer is given by dictum in *Klein v. Beach*, 232 F. 240, 247, affirmed without mentioning the point in 239 F. 108. Herbert

v. Fields, 152 N. Y. S. 487; Nillson v. Lawrence, 148 App. Div. 678, 133 N. Y. S. 293; Amdur Copyright Law and Practice, p. 834f, are in accord. Copyrights are similar in purpose to patents, and patent law protects a licensee of a joint owner from suit by another joint owner. Talbot v. Quaker State Oil Refining Co., 104 F. 2d 967 (41 U. S. P. Q.); Paulus v. M. M. Buck Mfg. Co., 129 F. 2d 594; Blackledge v. Weir & Craig Mfg. Co., 108 F. 71. It is reasonable that the principle covers copyrights. Therefore, Feist, Inc. and through it Loew's, received a valid license to use the song, a good defense to a suit by a co-owner Piantadosi."

That Ken Griffin had a property right (common law copyright) in the new arrangement under which he could grant a license, is not even argued by appellees, for on page 24 of their opening brief they state:

"Not only, therefore, was the prior recordation of the assignment unnecessary, but since Griffin conveyed common law rights only, his assignment would not even have had to be of a formal nature, or in writing, *Freudenthal v. Hebrew Pub. Co.*, 44 F. Supp. 754, at p. 755 (S. D. N. Y. 1942). See also, *Houghton Mifflin Co. v. Stackpole Sons, Inc.*, 104 F. 2d 306 (2d Cir. 1939), where the Court said:

"'Since Adolph Hitler did not himself take out the copyright there was no need for a formal assignment by him.'"

It is elementary that the property right Ken Griffin had in the new arrangement arose on the date he composed same, and that he could grant a license thereunder or assign same on any date thereafter, both of which acts were subsequently done.

#### POINT FOUR (4).

**The Copyright on the New Arrangement Obtained By Appellant Biltmore Music Corporation Was Invalid Inasmuch as It Had Been Published Due to Widespread Public Playing Thereof Prior to the Date Biltmore Applied for Copyright Protection on the Dreyer-Bard Arrangement.**

Copyright registration E Pub. No. 24797 granted to appellant Biltmore Music Corporation covered a musical composition that comprised English lyrics composed by Dave Dreyer and J. F. Bard and music which was the new arrangement composed by Ken Griffin. On March 15, 1948 appellant Biltmore Music Corporation filed application for a copyright [Tr. p. 46, Par. 21] which resulted in the issuance of copyright E Pub. No. 24797. It should be particularly noted that this application for statutory copyright protection on the new arrangement was filed six months after the first phonograph records of the new arrangement were publicly released by Chicago, and that during this six-month period at least 4,000 records of the new arrangement were sold to the public by Chicago [Tr. pp. 42-43, Par. 10].

Appellee contends that as a result of the wide-spread sale of phonograph records of the new arrangement during said six-month period, publication of the new arrangement occurred, and the Biltmore copyright E Pub. No. 24797 is invalid as a result thereof.

Appellee's contention relative to the widespread public use and sale of phonograph records constituting a publication being sufficient to invalidate a subsequently secured statutory copyright is supported by several District Court decisions. In *Shapiro, Bernstein & Co., Inc. v. Miracle*



*Record Company, Inc.* (D. C. N. D., Ill.), 86 U. S. P. Q. 193, 194, the court stated:

"It seems to me that publication is a practical question and does not rest on any technical definition of the word 'copy'. \* \* \* When phonograph records of a musical composition are available for purchase in every city, town and hamlet, certainly the dissemination of the composition to the public is complete, and is as complete as by sale of a sheet music reproduction of the composition. The Copyright Act grants a monopoly only under limited conditions. If plaintiff's argument is to succeed here, then a perpetual monopoly is granted without the necessity of compliance with the Copyright Act. \* \* \* It is my opinion that when Lewis permitted his composition to be produced on phonograph records and permitted these records to be sold to the general public, the common law property in the musical composition did not survive the sale of the phonograph records, and the public sale of those records was a dedication of the musical composition to the public."

In *Mills Music, Inc. v. Cromwell Music, Inc.*, (D. C. S. D., N. Y.), 103 U. S. P. Q. 84 at page 95, Judge Liebell in an extensive opinion stated,

"The manufacture and sale of phonograph records in this country by a person or corporation duly authorized by Miron would have constituted a publication of his composition. I believe that it would be a publication, capable of destroying his common law copyright. If he had obtained a statutory copyright prior to the manufacture and sale of the phonograph records, the sale of the records would have no effect on Miron's rights, which then would be based on the copyright statute. The weight of legal authority seems to support that view. (R.C.A. Mfg. Co. v.

Whiteman, 114 F. 2d 86, 46 U. S. P. Q. 324; Shapiro Bernstein & Co. v. Miracle Record Co., 91 F. Supp. 473, 86 U. S. P. Q. 193.) But there was no such authorized manufacture and sale of records of 'Tzena' prior to Miron's agreement with and assignment to plaintiff through Miron's agent Olshansky."

The question as to whether widespread sale of phonograph records can invalidate a subsequently obtained statutory copyright is indeed a practical one. If such sales do not invalidate a subsequently obtained statutory copyright, a means is provided that permits the statutory licensing feature of the Copyright Act to be completely circumvented.

Circumvention of this feature of the Act can be easily achieved by a composer in licensing the mechanical reproduction of his composition on which no application for statutory copyright protection is made. By so doing the composer enjoys a common law copyright on the composition which can be of perpetual duration. A composer acting in the above-described manner operates under the distinct advantage that he alone or his licensee is the only one who can mechanically reproduce his composition, and as a result, eliminates all competition in the phonograph record field.

The only real disadvantage suffered by a composer acting in this manner is that he cannot print sheet music or orchestrations of his composition without recourse to the protection offered by the Copyright Act. However, the remuneration derived from the sale of sheet music and orchestrations is normally small in comparison to the dollar volume sale of phonograph records. Therefore, if widespread circumvention of the compulsory licensing feature

of the Copyright Act is to be avoided, it is essential that this Court approve the ruling of Judge Igoe in the case of *Shapiro, Bernstein & Co., Inc. v. Miracle Record Co.*, 86 U. S. U. Q. 193, 194.

That publication can occur without recourse to sheet music, orchestrations, and other printed material is aptly demonstrated by the recent song success, "Davy Crockett." Due to the widespread public playing of this composition on phonograph records, as well as through the media of radio and television, hardly a child exists throughout the United States who cannot sing or hum the "Davy Crockett" score as well as recite a good portion of the lyrics thereof. Legally to say that there can be no publication of a musical composition by the playing of phonograph records thereof is to simply disregard the actual facts.

In the present instance, widespread sale of phonograph records of the new arrangement did occur prior to application for statutory copyright thereon, and to such extent that the statutory copyright secured by appellant Biltmore is invalid.

### POINT FIVE (5).

No appealable error has been brought before the Court by appellants. The mere fact that the losing party is unhappy with the judgment of a Trial Court (as is always the case) does not require the Appellate Court to retry the case. Defendants must first show an appealable error. Here, appellants have failed to do so.

"It is the appellant's duty to bring up a record that discloses error. Every intendment should be in favor of the lower court's judgment." (*Hardt v. Kirkpatrick*, 91 F. 2d 875, 878 (C. A. 9, 1938)).



“The burden of showing grounds on which a judgment should be reversed rests on the appellant, *Elias v. Clarke*, 2 Cir., 143 F. 2d 640, certiorari denied, 323 U. S. 778, 65 S. Ct. 191, 89 L. Ed. 622.

“A federal court of appeals must assume that the judgment of a federal district court appealed from is a legally correct adjudication of the controversy. (*Chicago Great Western Ry. Co. v. Beecher*, 8 Cir., 150 F. 2d 394, 399, certiorari denied, 326 U. S. 781, 66 S. Ct. 339, 90 L. Ed. 473.” (*Danaher v. United States*, 184 F. 2d 673, 675 (C. A. 8, 1950).)

Appellants have not challenged a single finding of fact, and the judgment is squarely supported by the findings. No error is disclosed by the record properly before this Court, and the judgment must therefore be affirmed.

#### POINT SIX (6).

The judgment should be affirmed.

Appellants had the burden of convincingly showing that the Trial Court committed a reversible error. They have failed to point to a single appealable error in the record. The judgment of the Trial Court should accordingly be affirmed.

Respectfully submitted,

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